STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

LINDA NEITHOFER,

Plaintiff,

Case No. 2005-5181-NF

vs.

AMERISURE INSURANCE COMPANY,

Defendant.

_____/

OPINION AND ORDER

Plaintiff moved for partial summary disposition under MCR 2.116(C)(10).

This cause of action is the result of injuries allegedly suffered by plaintiff due to an auto accident that occurred on December 25, 2004. Plaintiff's husband was driving the vehicle when the accident occurred, and the Court is advised that it was an uninsured vehicle. Because it was uninsured, plaintiff applied for no-fault benefits with defendant insurance company through the Michigan Assigned Claims Facility. Plaintiff's instant request for partial summary disposition is based on the provisions of MCR 2.312(B) which provides that each matter as to which a request is made is deemed admitted unless within 28 days after service ... the party requesting the admission is served with a written answer or objection. Plaintiff submits that defendant failed to timely answer plaintiff's request for admissions, nor did defendant petition the Court for leave to file late answers.

Standard of Review

A motion for summary disposition under MCR 2.116(C)(10) challenges the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed,* 470 Mich 274, 278; 681 NW2d 342 (2004). The record is considered in a light most favorable to the nonmoving party to determine

whether a genuine issue of material fact exists that precludes granting judgment as a matter of law to the moving party. *Laier v Kitchen,* 266 Mich App 482, 486-487; 702 NW2d 199 (2005). Once the moving party has met the initial burden by supporting its position with documentary evidence, the burden shifts to the nonmoving party to establish the existence of a genuine issue of fact. *Pena v Ingham Co Rd Comm,* 255 Mich App 299, 310; 660 NW2d 351 (2003). A genuine issue of fact exists when the record leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp,* 469 Mich 177, 183; 665 NW2d 468 (2003).

Our legal system favors disposition of litigation on the merits. *Vicencio v Ramirez,* 211 Mich App 501, 507; 536 NW2d 280 (1995). Accordingly, dismissal is a drastic step that must be taken cautiously. *Id.* Before imposing such a sanction, the trial court is required to carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper. *Id* at 506.

The Court also notes that on May 11, 2006, an order to modify discovery was entered, leaving the parties until August 13, 2006 to complete discovery. Generally, a motion for summary disposition under MCR 2.116(C)(10) is premature when discovery on a disputed issue has not been completed. *Colista v Thomas,* 241 Mich App 529, 537; 616 NW2d 249 (2000). Summary disposition may be proper before the close of discovery if there is no reasonable chance that further discovery will result in factual support for the nonmoving party. *Id* at 537-538.

Applicable Law

Plaintiff relies on the provisions of MCR 2.312(B)(1) for her request for judgment in her favor, which provides that each matter as to which a request is made is deemed admitted unless, within 28 days after service of the request, or within a shorter or longer time as the court may

allow, the party to whom the request is directed serves on the party requesting the admission a written answer or objection addressed to the matter. It further provides that unless the court orders a shorter time a defendant may serve an answer or objection within 42 days after being served with the summons and complaint.

Admissions are sought to facilitate proof with respect to issues that cannot be eliminated from the case and to narrow the issues by eliminating those that can be. *Radtke v Miller, Canfield, Paddock & Stone,* 453 Mich 413, 420; 551 NW2d 698 (1996). By encouraging admissions, the goal of MCR 2.312(D)(2) is thus the same as the goal of the rule itself, that is, to expedite the pending action. *Id.* The trial judge has the discretion to allow the party to file late answers or even to amend or withdraw the answers. *Janczyk v Davis,* 125 Mich App 683, 691; 337 NW2d 272 (1983)[1]. When a trial judge is asked to decide whether or not to allow a party to file late answers to the request for admissions, he is in effect called upon to balance between the interest of justice and diligence in litigation. *Id.*

Therefore, the trial judge is to balance three factors in determining whether or not to allow a party to file late answers. *Id* at 692. First, whether or not allowing the party to answer late "will aid in the presentation of the action". [Citations omitted.] *Id.* In other words, the trial judge should consider whether or not refusing the request will eliminate the trial on the merits. *Id.* Obviously, this factor militates against granting summary judgment. *Id.* Second, the trial court should consider whether or not the other party would be prejudiced if it allowed a late

[1] The Court notes plaintiff refutes the holding in *Janczyk,* based on discussion in an unpublished opinion. The Court reminds the parties that while informative, instructive, and perhaps persuasive, an unpublished opinion is not precedentially binding under the rule of stare decisis. MCR 7.215(C). The trial courts of this state are required to follow the published decisions of panels of this court unless overruled by our Supreme Court. *Michigan Millers Mutual Ins Co v Bronson Plating Co,* 197 Mich App 482, 490; 496 NW2d 373 (1992).

answer. *Id.* Third, the trial court should consider the reason for the delay: Whether or not the delay was inadvertent. *Id* at 692-693.

Discussion

Plaintiff submits that plaintiff's first request for admissions and second set of interrogatories was served on defendant on January 11, 2006. The record shows that on February 28, 2006, this Court entered an order compelling both plaintiff and defendant to answer interrogatories on or before March 13, 2006. The record further shows that defendant filed its answer to plaintiff's first request for admissions and second set of interrogatories on March 1, 2006 – several days before the court-ordered deadline.

Defendant stated the difficulties it had in filing the answers to admissions in time: Defendant received a first request for admissions coupled with a second set of interrogatories, and was also served that same day with a first set of interrogatories coupled with a request for production of documents. Defendant finally was able to respond to the first request for admissions and second set of interrogatories on February 28, 2006. Defendant admits it failed to seek permission from the Court to file late but states that unforeseen circumstances prevented the timely filing.

The Court is in agreement with defendant as it concerns the context of the admissions requested, insofar as the requests, if deemed admitted, would produce ridiculous results; moreover, they would effectively eliminate the trial on the merits. Because discovery is not yet closed, and this case is relatively new, plaintiff is not prejudiced by allowing defendant's late filing of answers, and the Court is convinced that defendant had legitimate, reasonable grounds for failing to follow the court rule to the letter.

While the Court concedes that there is no genuine issue of material fact over which reasonable minds could differ that defendant failed to file answers to request for admissions in a timely manner, were the Court to grant summary disposition on this basis *alone*, it would contravene the principles of law, that is, allowing form over substance to be outcome determinative, rather than allowing the merits of the case to be presented and deliberated on. To this end, the Court finds plaintiff's motion for summary disposition improper under these circumstances, and declines to grant plaintiff's request.

For the above-stated reasons, plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10) is DENIED. Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order does not resolve the last pending claim and does not close the case.

IT IS SO ORDERED.

Diane M. Druzinski, Circuit Court Judge

Date: JUL 25 2006

DMD/aac

cc: Jason P. Kief, Attorney at Law
Mark A. Roberts, Attorney at Law

DIANE M. DRUZINSKI
CIRCUIT JUDGE

JUL 25 2006

A TRUE COPY
CARMELLA SABAUGH, COUNTY CLERK
BY: _____ Court Clerk